No. 4401

In the Circuit Court of Appeals of the United States for the Ninth Circuit

E. H. BARBER, NAVAL DISBURSING OFFICER,
APPELLANT

v.

WILLIAM BRAWNER HETFIELD, APPELLEE

BRIEF FOR APPELLANT

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Constitution and Statutes:

In the Circuit Court of Appeals of the United States for the Ninth Circuit

E. H. BARBER, NAVAL DISBURSING Officer, appellant,
v.
WILLIAM BRAWNER HETFIELD, appellee
No. ——

BRIEF ON BEHALF OF APPELLANT, E. H. BARBER, NAVAL DISBURSING OFFICER

STATEMENT OF THE CASE

This is an appeal from a decree of the United States District Court for the Southern District of California, Southern Division, Judge McCormick, granting a petition docketed on the Equity side of the court of William Brawner Hetfield, lieutenant commander, U. S. Navy, appellee, for a writ of mandamus directing E. H. Barber, naval disbursing officer, appellant, to pay 20 per centum withheld from his pay pursuant to orders of the Secretary of the Navy dated August 11, 1924, and of the Comptroller General of the United States to liquidate an indebtedness of $2,820.71 certified by the Comptroller General in a statement of appellee's account to be due the United States.

The petitioner averred that $402.35 had been withheld as 20 per centum of his pay for the period from April 1 to September 15, 1924, and prayed for a writ of mandamus against appellant requiring payment thereof notwithstanding the Comptroller General had certified that upon a statement of appellee's account he was indebted to the United States in the sum of $2.870.71, as overpayments for the period from April 22, 1919, to March 31, 1922. The petitioner, appellee, further prayed that appellant be directed to thereafter pay him the full amount of his compensation. Appellant moved that the petition be dismissed on the ground that the District Court had no jurisdiction to grant the relief prayed for. The court overruled the motion and on November 28, 1924, directed issuance of the writ as prayed. From this decree this appeal was taken on the grounds that the United States District Court for the Southern District of California erred in denying respondent's motion to dismiss the action for the reason that the court had no jurisdiction thereof.

ARGUMENT

I

The court had no jurisdiction under the judicial code, or otherwise, to direct the issuance of a writ of mandamus to the appellant, a naval disbursing officer, requiring him to pay from general appropriations sums withheld from appellee's, a naval officer's salary to apply on his indebtedness to the United States

At the threshold of every proceeding at law or in equity in the District and Circuit Courts of

Appeal of the United States is the question of jurisdiction. The law is well settled that the courts of the United States inferior to the Supreme Court are creatures of Congress and possess no powers except those specifically granted to them by acts of Congress, and this limitation applies to all causes which, under the Constitution, Congress might have granted them jurisdiction to hear and determine. (*Brown* v. *Keene,* 8 Peters, 112; *Robertson* v. *Cease,* 97 U. S. 646, *Stevenson* v. *Fain,* 195 U. S. 165; *Lewis Publishing Company* v. *Wyman,* 152 Fed. 200.) So well settled is this principle of law the presumption is that a cause is without the jurisdiction of United States District Courts, unless the contrary be affirmatively shown. (*Ex parte Smith,* 94 U. S. 455; *Shade* v. *Northern Pacific Railroad Company,* 206 Fed. 353.)

There are two other principles of law to which the court's attention is invited in connection with this entire question of jurisdiction of the court below to direct the issuance of a writ of mandamus to a disbursing officer of the Navy requiring him to pay from general appropriations sums of salary to a Naval officer, and these are: (1) that a proceeding against an officer of the United States concerning public money is a proceeding against the United States, for jurisdiction must be determined by the real and not the nominal parties in interest (*Wells* v. *Roper,* 246 U. S. 335; *Louisiana* v. *McAdoo,* 234

U. S. 627; *Oregon* v. *Hitchcock,* 202 U. S. 60; and (2) that the United States may not be sued except with its consent and in the courts and form expressly provided by law for that purpose (*Comegys* v. *Vasse,* 1 Peters, 193; *Nicholl* v. *United States,* 7 Wall. 122; *Belknap* v. *Schild,* 161 U. S. 10).

For more than three quarters of a century, and until the establishment of the Court of Claims in 1855, the United States could not be sued. Then, as now, the original Judiciary Act of 1789, carried into the Revised Statutes as section 716, provided that—

> The Supreme Court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided by statute, which may be necessary to their respective jurisdictions and agreeable to the usages and principles of law.

There is here no specific grant of authority to United States District Courts to issue writs of mandamus to Naval disbursing officers requiring them to pay from general appropriations sums of salary to Naval officers, and it has been settled by decisions of the United States Supreme Court which are imperatively binding on the court below and on this court that said statute contains no legislative grant of jurisdiction to issue such writs. In *Brashear* v. *Mason* (6 Howard, 93) an applica-

tion was made by an officer of the Navy for a writ of mandamus to the Secretary of the Navy and not to one of his subordinates, as here directing him, to cause payment to be made of his salary. The Supreme Court affirmed the action of the lower court in refusing to direct issuance of the writ. The court, among other things, said:

> In the case of *Decatur* v. *Paulding* (14 Peters, 497) it was held by this court that a mandamus would not lie from the Circuit Court of this District to the Secretary of the Navy to compel him to pay to the plaintiff a sum of money claimed to be due her as a pension under a resolution of Congress. There was no question as to the amount due, if the plaintiff was properly entitled to the pension; and it was made to appear in that case, affirmatively, on the application, that the pension fund was ample to satisfy the claim. The fund also was under the control of the Secretary and the moneys payable on his own warrant. *Still the court refused to inquire into the merits of the claim* of Mrs. D. to the pension, or to determine whether it was rightfully withheld or not by the Secretary, *on the ground that the court below had no jurisdiction over the case,* and, therefore, the question not properly before this court on the writ of error. [Italics supplied.]
>
> * * * * *
>
> The principles of the case of Mrs. Decatur are decisive of the present one. The facts

here are much stronger to illustrate the inconvenience and unfitness of the remedy.

* * * * *

It will not do to say that the result of the proceeding by mandamus would show the title of the realtor to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for upon this ground any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding by mandamus would become as common in the enforcement of demands upon the government as the action of assumpsit to enforce like demands against individuals.

The lower court there had no jurisdiction under the Judiciary Act, the same section of which is the sole source of jurisdiction taken in this case because the United States had not consented to be sued by its Naval officers. The United States has not to this day consented to be sued in District courts by any of its officers or employees, for section 24 of the Judicial Code of March 3, 1911 (36 Stat. 1093), expressly denies jurisdiction to United States District Courts of—

Cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purposes by persons claiming as such officers or as assignees or legal representatives thereof.

Appellee could not have sued the United States in the court below for the sum alleged to have been illegally withheld from his salary. He could only sue in the Court of Claims in Washington. (See *United States* v. *McCrary,* 91 Fed. 295; *Scully* v. *United States,* 193 Fed. 185.) The language of the United States Supreme Court in *United States* v. *Guthrie* (17 Howard, 284), where a territorial judge had sought a writ of mandamus against the Secretary of the Treasury to require payment of his salary, is peculiarly applicable to the action of the court below in this case, that is—

> Unless there could have been shown some power in the circuit court competent to the repealing of the legislation of Congress, in the organization by the Treasury Department—competent, too, to the annulling of the explicit rulings of this court in the cases hereinbefore cited—the circuit court could have no jurisdiction to entertain the application for a writ of mandamus in this instance.

There can be no doubt that prior to 1855 no court of the United States had jurisdiction to issue a writ of mandamus to any officer of the United States requiring the payment of public money from the Treasury on any account whatever, and it is submitted that the consent of the United States to be sued in the Court of Claims and concurrently in the District Courts on certain limited causes of action did not change the law as to the issuance of mandamus requiring the payment of public money,

especially where the court, as here, does not have jurisdiction to entertain a suit in the particular cause of action. Appellee and the court below rely on *Smith* v. *Jackson* (246 U. S. 388) as being applicable and as having established a different rule. That case will be explained and distinguished at the proper place in this brief, it being sufficient here to point out that the jurisdictional statutes, sections 552, 554 and 555 of the Code for the Panama Canal Zone, set out in full in 241 Fed. at page 752, are much broader than section 716, Revised Statutes, under which the court below in this case took jurisdiction. This is also true of *United States* v. *McVeagh* (214 U. S. 124), which arose in the District of Columbia. There is nothing in either decision to indicate any intention to modify or reverse the *Decatur, Brashear* and *Guthrie* cases or to overthrow a practice existing since the beginning of the Government.

II

The court had no jurisdiction to issue a writ of mandamus to appellant, a naval disbursing officer, requiring him to make payments from general appropriations to appellee, a naval officer, contrary to the orders of the Secretary of the Navy and the Comptroller General of the United States

Article 1, Section 9, of the Constitution, provides that—

> No money shall be drawn from the Treasury but in consequence of an appropriation made by law; and a regular statement and account of the receipts and expenditures of

all public money shall be published from time to time.

The fundamental law of the land gives to Congress exclusive power to appropriate money, and it has been held, as would appear to be obvious, that the power to appropriate carries with it the power to specify the purposes for which the money may be used, and whether, if at all, an accounting therefor shall be required. (*United States* v. *McDougall,* 121 U. S. 89; *Caro Co.* v. *United States,* 20 Ct. Cls. 174; *Shipman* v. *United States,* 18 *id.* 137.) Even under the Confederation there was an accounting system. It was established by the Ordinance of September 26, 1778, Vol. XII, Journals of the Continental Congress, pages 956 to 961, which provided for a Comptroller, an auditor, a treasurer, and two chambers of accounts. The auditor was required to receive all claims brought against the United States for money lent, expended, or advanced, goods sold or purchased, services performed or work done, and to refer them to one of the chambers of accounts. Said Ordinance further provided:

> That the commissioners to whom an account is referred * * * shall carefully examine the authenticity of the vouchers (rejecting such as shall not appear good), compare them with the articles to which they relate, and determine whether they support the charges; that they shall reduce such articles as are overcharged, and reject such

as are improper, and shall endorse the accounts in the manner marked C, and transmit them with the vouchers to the auditor and cause an entry to be made of the balances passed.

That the auditor shall receive the vouchers and accounts from the commissioners to whom he referred them, and cause them to be examined by his clerks. He shall compare the several articles with the vouchers, and if the parties concerned shall appeal from the judgment of the commissioners, he shall call before him the commissioners and the party, and hear them, and then make determination, from whence no appeal shall lie, unless to congress. That after a careful examination of the account as aforesaid, he shall endorse it in the manner marked D, of which indorsement he shall send a duplicate, to be filed in the same chamber of accounts and shall transmit the account and vouchers to the comptroller.

That the comptroller shall keep the treasury books and seal and shall file all the accounts and vouchers on which the accounts in said books are forwarded, and shall direct the manner of stating and keeping the public accounts. He shall draw bills under the said seal, on the treasurer, for such sums as shall be due by the United States, on accounts audited [which, previous to the payment, shall be countersigned by the auditor] and also for such sums as may, from time to time, be ordered by resolution of congress [which previous to the payment shall be counter-

signed by the Secretary of Congress] * * *. That when monies are due to the United States on accounts audited he shall notify the debtor, and (after hearing him if he shall desire to be heard) fix a day, for payment [according to the circumstances of the case not exceeding ninety days] of which he shall give notice to the auditor, in writing * * *.

That he shall, every quarter of a year, cause a list of the balances on the treasury books to be made out by his clerks, and pay it before congress. That, where any person hath received public monies, which shall remain unaccounted for, or shall be otherwise indebted to the United States, or have an unsettled account with them, he shall issue a summons * * *, in which a reasonable time shall be given for the appearance of the party, according to the distance of his place of residence from the treasury, of which he shall notify the auditor:

That, in case a party summoned to account shall not appear, nor make good essoign, the auditor, on proof of service made in due time or other sufficient notice, shall make out a requisition * * *, which he shall send to the comptroller's office where the same shall be sealed, and then it shall be sent to the executive authority of the State in which the party shall reside.

In other words, no money could be secured from the public treasury except upon a warrant countersigned by the Comptroller. Said requirement ap-

peared in the act of September 2, 1789 (1 Stat. 65), organizing the Treasury Department, was continued in the acts of March 3, 1817 (3 Stat. 366), and July 31, 1894 (28 Stat. 207), reorganizing the accounting offices of the treasury and, under the act of June 10, 1921 (42 Stat. 23, 27), amending and reorganizing the accounting system, exists to-day as a duty of the Comptroller General of the United States. This means that not one dollar could be placed to the disbursing account of appellant should the Comptroller General refuse to countersign a warrant debiting the general appropriations for the support of the Navy and crediting his disbursing account. This safeguard was recognized by Mr. Justice Nelson in delivering the opinion of the Court in *Brashear* v. *Mason* (6 Howard, 93, *supra*), where he said, at pages 100 and 101, that—

> We are also of opinion that if the plaintiff had made out a title to his pay as an officer of the United States navy, a mandamus would not lie in the court below to enforce the payment.
>
> The Constitution provides that no money shall be drawn from the treasury but in consequence of appropriations made by law. (Art. I., Sec. 9). And it is declared by act of Congress (3 Statutes at Large, p. 689, Sec. 3) that all moneys appropriated for use of the war and navy departments shall be drawn from the treasury by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of these de-

partments, countersigned by the second comptroller.

And by the act of 1817 (3 Statutes at Large, p. 367, Secs. 8, 9) it is made the duty of the comptrollers to countersign the warrants only in cases when they shall be warranted by law. And all warrants drawn by the Secretary of the Treasury upon the treasurer shall specify the particular appropriations to which the same shall be charged; and the moneys paid by virtue of such warrants shall, in conformity therewith, be charged to such appropriations in the books kept by the comptrollers; and the sums appropriated for each branch of expenditure in the several departments shall be solely applied to the object for which they are respectively appropriated and no others. (2 Statutes at Large, p. 535, Sec. 1.)

Formerly the moneys appropriated for the war and navy departments were placed in the treasury to the credit of the respective secretaries. That practice has changed, and all the moneys in the treasury are in to the credit or in the custody of the treasurers, and can be drawn out, as we have seen, only on the warrant of the Secretary of the Treasury, countersigned by the comptroller.

The Comptroller General, who, by the act of June 10, 1921, succeeded the former auditors and Comptroller of the Treasury, is endowed with large powers and responsibility and it is his sworn duty under the law to determine the availability of general appropriations and whether any sum is

properly payable therefrom. This responsibility was also recognized by the Supreme Court in *United States* v. *Lynch* (137 U. S. 280), where the Court denied a mandamus to the accounting officers, and said:

> The contention of the relator is that the interpretation he puts upon the act is too obviously correct to admit of dispute, and that this court has so decided but it does not follow because the decision of the Comptroller and Auditor may have been erroneous, that the assertion of relator to that effect raises a cognizable controversy as to their authority to proceed at all. What the relator sought was an order coercing these officers to proceed in a particular way and this order the Supreme Court of the District declined to grant. If we were to reverse that judgment upon the ground urged, it would not be for want of power in the Auditor to audit the account and in the Comptroller to revise and pass upon it, but because those officers had disallowed what they ought to have allowed and erroneously construed what needed no construction. This would not in any degree involve the validity of their authority. (*Snow* v. *United States,* 118 U. S. 346; *Baltimore and Potomac Railroad Co.* v. *Hopkins.* 130 U. S. 210.) In *Clayton* v. *Utah Territory* (132 U. S. 632) the power vested in the governor of the Territory of Utah by the organic act to appoint an auditor of public accounts was drawn in question; and

in *Clough* v. *Curtis* (134 U. S. 361, 369) the lawful existence, as the legislative assembly of the Territory of Idaho, of a body of persons claiming to exercise as such the legislative power conferred by Congress, was controverted. In *Neilson* v. *Lagow* (7 How. 772, 775, and 12 How. 98) the plaintiff in error claimed the land in dispute through an authority exercised by the Secretary of the Treasury, and the State court decided against its validity. The existence or validity of the authority was primarily involved in these cases, and they contain nothing to the contrary of our present conclusion.

Why the relator did not bring suit in the Court of Claims does not appear, nor does the record show the reasons of the Second Comptroller for rejecting this claim in 1887, nor for the action of the present Auditor and Comptroller other than as indicated in the demurrer. These matters are, however, immaterial in the view which we take of the case.

The Ordinance of September 26, 1778, also required the accounting officers to audit and settle claims and accounts against the United States; that is, determine whether the payments claimed or the payments made for which credit was requested against funds advanced were authorized by law. The accounting officers under the Constitution have also had that power and duty continued and imposed on them by the several statutes organizing and reorganizing the accounting system; that

is, the acts of September 2, 1789, March 3, 1817, July 31, 1894, and June 10, 1921, *supra*. A good description of this function is found in the opinion of the Court of Claims in *McKnight* v. *United States* (13 Ct. Cls. 299), where the court, after referring to the fact that the accounting officers audited and paid certain claims, at page 304, said:

> But vast sums of money are paid to parties for salaries and on other accounts by disbursing officers before the claims have passed the Treasury accounting, and the number of such officers is large, their appointments being provided for by special or general provisions of statute. * * * They are all under bonds and responsible for the legality and correctness of their payments. Their accounts are finally settled through the accounting officers, and every item charged therein is subject to examination and adjustment, as are all other demands, and only such are allowed as are found to be sufficiently vouched for and to have been legally and rightfully paid.

These settlements are made by statute conclusive on all executive officers of the United States, including appellant and appellee. See act of March 30, 1868 (15 Stat. 54), as now contained in section 304 of the act of June 10, 1921 (42 Stat. 24). See also *Winnissimet* v. *United States* (12 Ct. Cls. 349). The decree of the Court below can not operate to give appellant credit in his accounts for the sums directed to be withheld from the salary of appellee

nor can it operate to force the Comptroller General to do that which the Supreme Court held in *United States* v. *Lynch, supra,* it did not have authority to do, that is, countersign a warrant placing additional funds to the credit of appellee. These principles are so obvious that no extended discussion of them would seem necessary, and it is equally obvious that neither the court below nor this court has authority to repeal statutes establishing the financial machinery of the United States and statutes, too, which have been in existence in one form or another since before the establishment of the Government itself. As to the rule in states where the accounting system is similar to that of the United States, see *Martin* v. *Greene* (29 N. Y. 647); *Carroll* v. *County Board* (28 Miss. 38); *Greene* v. *Purnell* (12 Md. 329); *Dewey* v. *State Auditors* (32 Mich. 191); *People* v. *Auditor General* (38 Mich. 746).

So far as the memorandum opinion discloses, the Court below gave no consideration to the foregoing insuperable obstacles to forcing a disbursing officer to make a payment from a limited amount of general appropriations intrusted to him for a particular purpose and contrary to the orders of the Comptroller General of the United States, nor did it give any consideration to the further insuperable obstacle that the Secretary of the Navy had ordered appellant by a general order dated August 11, 1924, and of which this court will take judicial notice on the authority of *Caha* v. *United States* (152 U. S.

211) to not pay petitioner in excess of 80 per centum of his pay but to withhold 20 per centum to apply on his indebtedness to the United States. Both matters were brought to the attention of the Court below in the oral argument and in a memorandum brief filed with the Court. The decision of the United States Supreme Court in *Plested* v. *Abbey* (228 U. S. 42), is squarely in point and is a much stronger case than the one at bar, for the Constitutional inhibition to the control of the courts over public money was not present. The court there said, among other things, that—

> We are of opinion that the principle which caused the Circuit Court to hold that it had no jurisdiction to award the relief prayed and hence to dismiss the bill was a correct one. The United States had not parted with legal title to the land, the defendants were subordinate officers of the Land Department, and the acts complained of were done pursuant to instructions from the head of the Land Department, vested by law with the power to control the conduct of his subordinates in matters of this character.
>
> As officers administering the land laws, the defendants were, in the nature of things, under the control and their acts were subject to the review of their official superiors—the Commissioner of the General Land Office and ultimately of the Secretary of the Interior. As said in *Litchfield* v. *Register & Receiver* (9 Wall. 575, 578), subordinate officials of the Land Department should not

> be called upon "to put the court in possession of their views and defend their instructions from the Commissioner and convert the contest before the Land Department into one before the court."
>
> * * * In the last named decision (*United States ex rel Ness* v. *Fisher,* 223 U. S. 683) the *Litchfield case* was cited with approval, and it was again reiterated that Congress has placed the Land Department under the supervision and control of the Secretary of the Interior, a special tribunal with large administrative and *quasi-judicial* functions, to be exerted for the purpose of the execution of the laws regulating the disposal of the public lands.

The Secretary of the Navy is vested by law with the control of the officers of his department, and the General Accounting Office, presided over by the Comptroller General of the United States, who is required by section 304 of the act of June 10, 1921 (42 Stat. 24), to exercise his functions without direction from any other officer, also has large administrative and *quasi-judicial* functions to be exerted for the purpose of the execution of the laws relating to the limitations, directions, and restrictions embodied in the vast mass of Federal laws relative to the use and expenditure of public funds from current appropriations. (See *Cameron* v. *Weedin,* 226 Fed. 44.) Both the Secretary of the Navy and the Comptroller General of the United States have directed appellant to not pay appellee in excess of 80 per centum of his pay and

to credit his overpaid account with the remaining 20 per centum. The decision in *Pested* v. *Abbey, supra,* is doubly applicable and the petition should have been dismissed by the court below on the authority of said case even if the principles hereinbefore and hereinafter discussed were not present.

The absolute authority committed by the express terms of statutes to the accounting officers in the settlement of all accounts and claims payable from general appropriations in which the United States are concerned and which settlements are conclusive on the executive departments should not be confused with the jurisdiction of the Courts to render judgment in a proper case against the United States. Such judgments are not payable from the general fund in the Treasury because of the provision of Article I, section 9, of the Constitution nor are they payable from general appropriations. It has been provided by the acts of September 30, 1890 (26 Stat. 537), that all judgments against the United States shall be certified to Congress for specific appropriation and by the act of February 18, 1904 (33 Stat. 41), that payment thereof shall be made by the accounting officers from the specific appropriations if and when made.

Where the Court has jurisdiction of a suit for or against the United States, the settlements of the accounting officers establish a prima facie case (*United States* v. *Pierson,* 145 Fed. 814; *United States* v. *Fidelity Company,* 150 Fed. 550; *United States* v. *Du Perow,* 208 Fed. 895), but are not con-

clusive on the courts (*United States* v. *Gilmore,* 189 Fed. 761), unless a statute makes them so (*United States* v. *Babcock,* 250 U. S. 328).

What the Court below did in effect was to take jurisdiction through what appellant believes to be a misconception of the law and render judgment against the United States for the withheld pay of appellee which had been earned and for pay which he had not but may earn in the future and to direct payment from general appropriations that have been or that may hereafter be made by Congress, and this without passing upon or giving judgment in favor of the United States in the way of counterclaim or set-off of the erroneous payments on the debit side of appellee's account and by reason of which the sums were withheld from the pay of appellee. It is submitted that such action can not be defended either upon principle or authority.

III

The court had no jurisdiction to direct issuance of a writ of mandamus requiring the salary of a naval officer to be paid from general appropriations

A mere reference to the act of June 10, 1922 (42 Stat. 625 to 633), entitled "An Act to readjust the pay and allowances of the commissioned and enlisted personnel of the Army, Navy, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service," is sufficient to demonstrate the determination of the amount of pay and allowances due a naval officer requires the exercise of discretion, Section 1 therefore assimilates

the pay of all commissioned officers of the services named in the title of said act according to the grade held and length of service in the grade and total length of service. Appellee is a lieutenant commander and as such is entitled to one of three different rates of pay in his grade. Also his right to subsistence and rental allowances depends upon the rate of pay, character of service, whether he has dependents, and whether he or his dependents have been assigned quarters. The terms of the current general appropriation act from which appellee demands his pay and allowances when they shall have been determined in accordance with the act of June 10, 1922, *supra,* and the terms of the general appropriation act from which *Brashear* demanded his pay in 6 Howard, 93, are here quoted in juxtaposition for comparison of their terms:

The general appropriation act of March 3, 1845 (5 Stat. 790), appropriated funds—

"For pay of commission, warrant, and petty officers, and seamen, including the engineer corps of the Navy, two million five hundred and nine thousand one hundred and eighty-nine dollars."

The general appropriation act of May 28, 1924 (43 Stat. 182), under the heading "Pay of the Navy," provided funds, page 193:

"For pay and allowances prescribed by law of officers on sea duty, and officers on waiting orders—pay, $26.431,298; rental allowance, $5.438,284; subsistence allowance, $3,331,700; in all, $35,201,282."

The Supreme Court said in the *Brashear case* that—

> Besides the duty of inquiring into and ascertaining the rate of compensation that may be due to the officers under the laws of Congress, no payment can be made unless there has been an appropriation for the purpose. And if made, it may have become already exhausted, or prior requisitions may have been issued sufficient to exhaust it.
>
> The Secretary is obliged to inquire into the condition of the fund, and the claims already charged upon it, in order to ascertain if there is money enough to pay all the accruing demands, and if not enough, how it shall be appropriated among the parties entitled to it.
>
> These are important duties, calling for the exercise of judgment and discretion on the part of the officer, and in which the general creditors of the government, to the payment of whose demands the particular fund is applicable, are interested, as well as the government itself. At most, the Secretary is but a trustee of the fund for the benefit of all those who have claims chargeable upon it, and, like other trustees, is bound to administer it with a view to the rights and interests of all concerned.
>
> It will not do to say that the result of the proceeding by mandamus would show the title of the relator to his pay, the amount, and whether there were any moneys in the treasury applicable to the demand; for upon

> this ground any creditor of the government would be enabled to enforce his claim against it, through the head of the proper department, by means of this writ, and the proceeding by mandamus would become as common in the enforcement of demands upon the government as the action of assumpsit to enforce like demands against individuals.

Neither the appropriation act of March 3, 1845, nor the appropriation act of May 28, 1924, nor indeed, any other appropriation act, fixes the amount of pay that shall be paid to a Navy officer. Such salaries have been fixed from time to time by the terms of general statutes on the basis of grade held, length of service, etc., and the reports of decisions of the Court of Claims and many of the reports of the United States Supreme Court contain many opinions as to the proper construction of said laws.

It would appear to be obvious that the statement of the court below, "the salary of Hetfield, which is definitely fixed by statute, is made payable monthly in the sum of $365.75," is not in accordance with the law and that the further statement "the duty of respondent in paying and disbursing such salary to an officer is purely ministerial" is in direct conflict with the decision of the Supreme Court in *Brashear* v. *Mason, supra.* It is also in direct conflict with the decision of the same court in *Decatur* v. *Paulding* (14 Peters, 497). In this case an application had been made for a writ of mandamus to the Secretary of the Navy to compel him to

make payments to the widow of an officer of the Navy of certain pay on account of the officer. Chief Justice Taney, who had been both Attorney General of the United States and Secretary of the Treasury and thus familiar through actual experience with the financial machinery of the United States, rendered the opinion of the court, affirming the lower court in its refusal to grant the writ. He said, among other things, that—

> If a suit should come before this Court, which involved the construction of any of these laws, the Court certainly would not be bound to adopt the construction given by the head of a department. And if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. *But their judgment upon the construction of a law must be given in a case in which they have jurisdiction,* and in which it is their duty to interpret the act of Congress, in order to ascertain the rights of the parties in the cause before them. The Court could not entertain an appeal from the decision of one of the Secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties. (Italics supplied.)
>
> The case before us illustrates these principles and shows the difference between ex-

> ecutive duties and ministerial acts. The claim of Mrs. Decatur having been acted upon by his predecessor in office, the Secretary was obliged to determine whether it was proper to revise that decision. If he had determined to revise it, he must have exercised his judgment upon the construction of the law and the resolution, and have made up his mind whether she was entitled under one only or under both. And if he determined that she was entitled under the resolution as well as the law, he must then have again exercised his judgment in deciding whether the half-pay allowed her was to be calculated by the pay proper or the pay and emoluments of an officer of the Commodore's rank. And after all this was done he must have inquired into the condition of the navy pension fund, and the claims upon it, in order to ascertain whether there was money enough to pay all the demands upon it; and if not money enough, how it was to be apportioned among the parties entitled. A resolution of Congress requiring the exercise of so much judgment and investigation can, with no propriety, be said to command a mere ministerial act to be done by the Secretary.

The decision of the Supreme Court in *Work* v. *Mosier et al.* (261 U. S. 352) is a late expression of the court on the subject of ministerial and discretionary duty. Said case is a much stronger case than the one at bar for the appellee for the reason that it concerned Indian moneys

which were deposited in the Treasury pursuant to statute to the credit of a trust fund for the Indians and could be drawn upon from time to time by the Secretary of the Interior without the interposition of Congress. In other words, the Constitutional prohibition in Article I, Section 9, was not present in the case. There the statutory direction to the Secretary to pay the parents the income due to the minors was clear and positive subject to the provision that the money could be withheld if the Commissioner of Indian Affairs should become satisfied that the money was being squandered or misused. The lower court granted a writ of mandamus requiring the money to be paid, and this action was reversed by the Supreme Court, which said:

> Subject to the construction we have put upon the statute, the discretion is vested in the Commissioner to determine in each case whether in his judgment there has been misuse or squandering, and within the same limitation, to decide what is misuse or squandering. Until he has had a full opportunity to exercise this discretion, neither he nor the Secretary can be compelled by mandamus to make the payment, and if in its exercise he does not act capriciously, arbitrarily, or beyond the scope of his authority, the writ will not issue at all.

Here there is not only a Constitutional prohibition against moneys being drawn from the Treasury

save in consequence of appropriations made by law and the accounting officers are the authorized officials to determine the availability of general appropriations, from which appellee must be paid if at all, but the statutes of the United States will be searched in vain for a "clear and positive" direction to appellant or any other Naval disbursing officer to pay appellee or any other Naval officer his pay or any part thereof.

The court below relied on *Smith* v. *Jackson* (246 U. S. 388) as authority for granting the petition in this case. For comparison there is quoted in parallel columns the terms of the appropriation act in the Smith case and the terms of the appropriation act from which appellee demands his pay:

The Sundry Civil act of March 3, 1915 (38 Stat. 883), appropriating funds for the Panama Canal Zone for the fiscal year 1916, provided:	The Naval appropriation act of May 28, 1924 (43 Stat. 182), appropriating funds for the Navy for the fiscal year 1925, provides:
"For Civil government of the Panama Canal and Canal Zone, salaries of district judge $6,000, district attorney $5,000, marshal $5,000," etc.	"For pay and allowances prescribed by law of officers on sea duty and other duty, and officers on waiting orders—pay, $26,431,298; rental allowance, $5,438,288; subsistence allowance, $3,331,700; in all, $35,201,282."

The distinction between the *Smith case* and the case at bar is apparent. In the *Smith case* the salary of the judge was appropriated in a fixed sum of $6,000 for the fiscal year and in the case at bar lump sums of $26,431,298 are appropriated for salary, $5,438,288 for rental allowances, or allowances in lieu of quarters, and $3,331,700 for subsistance allowances or a total of $35,201,282 for all of the thousands of commissioned officers in the Navy. Furthermore, in the *Smith case* there was no necessity for referring to and construing the terms of some permanent law and of making computations to determine the amount of the judge's salary, whereas in this case, and as hereinbefore pointed out, it is necessary to refer to and construe the act of June 10, 1922 (42 Stat. 625, 633), and other statutes and to make calculations thereon to determine the pay and allowances of appellee. There is nothing in the opinion of the Supreme Court in the *Smith case* to indicate an intention of said court to overrule its prior opinions and decisions in the *Decatur*, *Brashear*, and *Guthrie cases*, and it is clearly distinguishable from said cases. The Circuit Court of Appeals pointed out in the *Smith case* (241 Fed. 747), quoted by the court below in this case, that "we think * * * the proper construction of the statute is clear and the salary should have been paid." The statute in the *Smith case* needed no construction, for the act of March 3, 1915, specifically appropriated: "Salaries of district judge, $6,000." etc.

It requires no argument to demonstrate that the statute in the instant case necessitates construction, for the Act of May 28, 1924, appropriated " pay and allowances prescribed by law of officers on sea duty and other duty, and officers on waiting orders, pay $26,431,298," etc. We are required, nay compelled, to go back to the act of June 10, 1922, and other applicable statutes to determine what is the rate of sea pay, waiting order pay, and other pay of officers of the Navy of any grade and then to compute the length of service, etc., to state the account of any officer in any of the various grades from the lowest of ensign to the highest of admiral. It would appear to be too clear for argument that the court below erred in following the inappropos decision in *Smith* v. *Jackson*, and in failing to follow the *Decatur, Brashear* and *Guthrie cases* which are squarely in point.

Furthermore, the *Smith case*, involved the salary of a judge, and all lawyers willingly admit that the independence of the judiciary demands that their salary be not diminished while the judges are in office. No such argument applies to the salary of a naval officer or other employees of the United States, as the Supreme Court recognized in the cases of *Gratiot* v. *United States* (15 Peters, 336); *McElrath* v. *United States* (102 U. S. 426); *United States* v. *Burchard*, (125 U. S. 176); and in *United States* v. *Stahl* (151 U. S., 366). In the *Burchard case*, for instance, erroneous payments were made

by a disbursing officer and all of the payments had been passed to his credit by the accounting officers. It was subsequently discovered that Burchard had been erroneously paid in part and upon a correct statement of his account the United States was allowed judgment on its counterclaim for the debit balance, the overpayment. The court there said, among other things, that—

> * * * in reality the account had never been closed, and was always open to adjustment. Overpayments made at one time by mistake could be properly credited and properly charged against the credits coming in afterwards. His pay was fixed by law, and the disbursing officers of the department had no authority to allow him any more. If they did, it was in violation of the law and he has no right to keep what he has thus obtained.

This is but a recognition and application of the well-settled principle of law that payments of public money made by officers or agents of the United States through either mistakes of law or fact may be recovered to the United States. (See *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190.) The Court of Claims in a recent decision in *Woog* v. *United States* (48 Ct. Cl. 80) went further and after a review of the authorities held that the United States could withhold the pay of an officer of the Marine Corps, which is a part of the Navy, to apply on the officer's indebtedness to a post exchange—a voluntary association composed of offi-

cers and enlisted men to supply and sell goods of various kinds to troops. The court there said:

> Considering all the circumstances and the tenor and scope of the decisions of the court of last resort, this court is of opinion that it was competent for the proper marine superiors and the accounting officers of the Treasury to withhold payments of plaintiff's intestate accounts until the officer or his representative should establish that the money committed to his care was not lost by or through fault or negligence of such custodian.

A full statement of facts in the *Smith case* is contained in 241 Fed. 747. The attention of this court is again particularly invited to the sections of the Code for the Canal Zone quoted on page 752 of said decision as to the authority of the District Court for the Canal Zone to direct issuance of writs of mandamus. Said sections confer far greater authority on said court than is conferred on United States District Courts by Section 716, Revised Statutes.

Furthermore, as shown from the statement of facts in the courts below, the Auditor for the Canal Zone, termed by the Supreme Court an accounting officer, was not an accounting officer within the meaning of the Ordinance of 1778, acts September 2, 1789, March 3, 1817, July 31, 1894, or June 10, 1921, *supra*. In other words the Auditor for the Panama Canal was

not a part of the accounting system of the United States, as was expressly pointed out in 241 Fed. pages 757 to 760. On the contrary, he was an administrative examiner of accounts such as is common to all of the departments and establishments of the Government, and certain claims and accounts examined by him were required by the act of October 22, 1913 (36 Stat. 209), to be settled by the Auditor for the War Department, one of the Treasury auditors, and now a part of the General Accounting Office. The courts below in the *Smith case* expressly declared page 760:

> I find no law making it incumbent upon the Auditor for the War Department to audit the salary of this relator, and there is nothing to show that, in the absence of statutory authority, this official had any authority to pass upon or to audit such salary.

The court had elsewhere declared in the opinion, page 759, that the question of the statement of the account of the judge had been improperly presented to the Comptroller of the Treasury who had no authority to pass upon it. In other words, the express language of the opinion shows that the court was considering a case where an administrative officer, similar to the disbursing clerk and Chief of the Division of Accounts in the Department of Justice, was withholding the salary of a judge which had been expressly appropriated in a lump sum per annum and, page 769, where "there was an absence of authority on the part

of anyone to make such a charge." The opinion of the Supreme Court on appeal must be read in connection with the facts, and when so read it is clear that it is not authority for the action taken by the court below in this case where the Comptroller General not only has the undoubted right but the legal duty to audit and state the appellee's pay account and the appellant's disbursing accounts and who because of a duty imposed on him by the express terms of Section 4 of the act of July 31, 1894 (28 Stat. 206), to superintend recovery of all balances certified by him to be due to the United States has denied authority to appellant to make the payment demanded.

That there may be no doubt in this matter, the attention of the court is invited to *Parish* v. *MacVeagh* (214 U. S. 124). There the Auditor for the War Department (one of the former accounting officers of the Treasury who was charged with the settlement of the accounts of the War Department), pursuant to an express statute conferring on the Secretary of the Treasury authority to settle a certain case "in accordance with the evidence collected by the United States Court of Claims," had examined the claim, found a balance due the claimant, and had issued a certificate of settlement for the sum found due. Thereupon it became the duty of the Secretary of the Treasury to issue a warrant for the certified balance, which warrant would then be for the countersignature of

the Comptroller of the Treasury. However, the Secretary refused to issue a warrant and it was held that a mandamus would issue to compel him to do so. Here it is to be noted that the jurisdictional statute of the Supreme Court of the District of Columbia is more comprehensive than section 716, Revised Statutes. The court expressly referred to the fact that the Treasury auditor had stated the account and, according to the well-settled Treasury Department practice and the law, all that the Secretary of the Treasury was required to do was to write out a warrant.

The decision of the court was entirely consistent with the decisions in the *Decatur, Brashear,* and *Guthrie cases* hereinbefore cited for the reason that the officials chargeable by law with the determination of availability of appropriations and the settlement of claims chargeable against available appropriations had not refused to pay the claim as they had in *United States* v. *Lynch* (137 U. S. 280), and as they have refused here to pay appellee in excess of 80 per centum of his pay because in the statement of his account they have found a debit balance due the United States.

Prior to the recent District Court cases of *Dillon* v. *Gross* (299 Fed. 851) and *Howe* v. *Elliott* (300 Fed. 243), the right of the accounting officers of the United States to offset overpaid items against credit items in the statement of the account of an officer of the Army, Navy, or Marine Corps had not been seriously questioned since the act of

1828, now section 1766, Revised Statutes, and the act of 1817, now section 305 of the act of June 10, 1921. The action of the court below and the action of the District Courts in the *Dillon* and *Howe cases,* if finally sustained, will not only overturn the accounting procedure in existence since the Ordinance of September 26, 1778, of the Continental Congress but will create a serious condition of affairs.

The annual expenditures of the United States now amount to billions of dollars and are made by thousands of disbursing officers, duly bonded, stationed throughout the world. Funds are advanced to them on the books of the Treasury on warrants countersigned by the Comptroller General and every payment made by them is audited and settled and balances certified pursuant to sections 304 and 305 of the act of June 10, 1921, and as described in *McKnight* v. *United States* (13 Ct. Cl. 395) in the General Accounting Office. There are approximately 200,000 officers and enlisted men in the Army, 150,000 in the Navy and Marine Corps, thousands of others in the Coast Guard, Coast and Geodetic Survey, and in the Public Health Service in addition to the more than 300,000 civil officers and employees. Statements of account of these officers and employees are maintained by the General Accounting Office and overpayments and short payments have been and are being made to them by disbursing officers from time to time; the overpayments are debited and

the short payments credited when subsequently discovered and the Comptroller General certifies a debit or credit balance which is deducted or paid by disbursing officers.

However, payments by disbursing officers are in no sense final, but merely tentative, subject to subsequent settlement by the accounting officers, and if the United States is to be denied the right which is accorded to every citizen of the country of stating accounts and deducting overpayments from credits coming in afterwards an intolerable situation will be created and great expense and losses imposed on the Government as well as burdens on the courts. It is proper to state that as a result of the opinions of the courts below in this class of cases a United States disbursing officer of the United States Court for China is being sued in said court by the District Attorney of said court for sums withheld from his pay to liquidate an erroneous payment made to him on account of unauthorized travel and certified due the United States on statement of his account.

In view of the situation brought about by the seeming misapplication of the decision of the Supreme Court in *Smith* v. *Jackson*, the following language from the concurring opinion of Mr. Justice Catron in *Decatur* v. *Paulding* (14 Peters, pages 520, 521) is peculiarly apropos:

> But the great question was decided below, that the Court have jurisdiction and power

sanction since the foundation of the government and directly contrary to the law as contained in decisions of courts of competent jurisdiction.

The hereinbefore referred to Ordinance of September 26, 1778, of the Continental Congress establishing an accounting system under the Articles of Confederation, provided in part:

> That, where any person hath received public monies, which shall remain unaccounted for, or shall be otherwise indebted to the United States, or have an unsettled account with them, he (the auditor) shall issue a summons * * *, in which a reasonable time shall be given for the appearance of the party, according to the distance of his place of residence from the treasury, of which he shall notify the auditor.
>
> That, in case a party summoned to account shall not appear, nor make good assign, the auditor, on proof of service made in due time or other sufficient notice, shall make out a requisition * * *, which he shall send to the comptroller's office, where the same shall be sealed, and then it shall be sent to the executive authority of the state in which the party shall reside.
>
> That it be recommended to the several states to enact laws for the taking of such persons, and also to seize the property of persons who, being indebted to the United States, shall neglect or refuse to pay the same; notice thereof shall be given by the auditor to the executive authority of the re-

> spective states, * * * under the treasury seal.

After the ratification of the Constitution and the organization of Congress, one of the first laws was the act of September 2, 1789 (1 Stat. 65), hereinbefore referred to, establishing the Treasury Department. Said statute required the Comptroller "to direct prosecutions for all delinquencies of officers of the revenue and for debts that are, or shall be, due the United States." The original statute did not make clear the procedure to be followed by the Comptroller, but the defect was remedied by the acts of March 3, 1795, and March 3, 1797 (1 Stat. 441 and 512), respectively, wherein it was made the duty of the Comptroller to "institute suit for the recovery of same," and on transcripts of the books of the Treasury the courts were required "to grant judgment and award execution accordingly." See *United States* v. *Pierson* (145 Fed. 814) and authorities there collated. The act of March 3, 1817 (3 Stat. 366), authorized and directed the accounting officers to settle and adjust all claims and accounts whatever in which the United States were concerned, whether as debtor or creditor, and the then First Comptroller was directed to "take all such measures as may be authorized by law to enforce prompt payment of all debts due the United States."

The requirement that the accounting officers settle and adjust all claims and demands whatever in which the United States are concerned, whether

as debtor or creditor, now forms section 305 of the Budget and Accounting Act of June 10, 1921 (42 Stat. 24), and section 4 of the act of July 31, 1894 (28 Stat. 207), as amended by the Budget and Accounting Act of 1921, contains the requirement that the Comptroller General, whose office has succeeded that of the former auditors and Comptroller of the Treasury, " shall superintend the recovery of all debts finally certified by them to be due to the United States." The settlements of the accounting officers of the United States are conclusive on all executive officers as to the availability of general appropriations but as to their legal correctness they are not conclusive on the courts unless a specific statute governing the class of cases makes them so. See *United States* v. *Babcock* (250 U. S. 328), where it was held that a settlement of a particular class of cases was conclusive on the courts.

However, when a court of competent jurisdiction disagrees with the accounting officers and renders judgment against the United States, such judgment can not be paid from the general fund in the Treasury because of Article I, section 9, of the Constitution, nor from general appropriations made by Congress but must be specifically appropriated for pursuant to the act of September 30, 1890 (26 Stat. 537), and paid on settlements of the accounting officers pursuant to the act of February 18, 1904 (33 Stat. 41). In other words, such settlements are

conclusive on the courts in so far as availability of general appropriations are concerned. Here the distinction between the jurisdiction of the accounting officers and of the courts clearly appears, the distinction being that the accounting officers settle and adjust "all claims, demands, and accounts whatever," unless the particular class is excepted by statute and pay the credit balance from any general appropriation that may be available while the courts settle only limited classes of cases against the Government as to which the consent of the United States to be sued has been expressly given and the judgments can not be paid until they have been reported to Congress for specific appropriations and the appropriations have been made. See *Collins* v. *United States*, 15 Ct. Cls. 35; *Reeside* v. *Walker*, 11 Howard 291.

Where the accounting officers find a balance due the United States, they are and have been required since the foundation of the Government to superintend its recovery. If suit is brought on any account settled by the accounting officers, Section 886, Revised Statutes, authorizes the courts "to grant judgment and award execution accordingly." This requirement has been construed by the courts to mean that a settlement of the accounting officers establishes a prima facie case. (*United States* v. *Pierson*, 145 Fed. 814; *United States* v. *Fidelity Company*, 150 Fed. 550; *United States* v. *Du Perow*, 208 Fed. 895, but not a conclusive case; *Gillmore case*, 189 Fed. 761.) The statements of

District Judge Sheppard in *Dillon* v. *Groos* (299 Fed. 851) and of District Judge Lowell in *Marc* v. *Alexander* to the effect that the settlements of the accounting officers are ex parte matters and binding on no one are neither in accordance with the statutes nor with judicial precedents.

It has not been the practice of the accounting officers since the beginning of the Government to require the institution of suit to collect balances certified by them to be due the Government except where there was no money due or accruing to the debtor from the United States. In other words, they have exercised the right of set-off in the adjustment of accounts. In *Gratiot* v. *United States* (15 Peters, 336) an Army officer contended that sums due him as salary could not be set off against sums due from him on another account to the Government. The United States Supreme Court sustained the right of set-off and said, among other things, page 369, that—

> There is another instruction asked under this exception, in a complicated form, but which mainly turns upon the consideration whether the treasury department had a right to deduct the pay and emoluments of the defendant, as a general of the army and while he was chief engineer, by setting them off against the balance reported against him on account of his superintendency of Forts Monroe and Calhoun. In our judgment, the point involves no serious difficulty. The United States possess the general right to

> apply all sums due for such pay and emoluments to the extinguishment of any balances due to them by the defendant on any other account, whether owed by him as a private individual or as chief engineer. It is but the exercise of the common right, which belongs to every creditor, to apply the unappropriated moneys of his debtor, in his hands, in extinguishment of the debts due to him.

The consideration of the court is also invited to the hereinbefore cited decisions of the Supreme Court in the *Burchard, McElrath,* and *Stahl cases* and to the decision of the Court of Claims in the *Woog case* sustaining the right of set-off against salaries of Army, Navy, and Marine Corps officers. In *Taggart* v. *United States* (17 Ct. Cl. 322) the Court of Claims said that—

> Where a person is both debtor and creditor of the United States in any form, the officers of the Treasury Department, in settling the accounts, not only have the power but are required in the proper discharge of their duties to set off the one indebtedness against the other, and to allow and certify for payment only the balance found due on one side or the other. Section 1766 of the Revised Statutes so provides, and special provisions on the subject, to meet the case of judgments recovered against the United States "or other claim duly allowed by legal authority," are made by the Act of March 3, 1875, ch. 149. (1 Supplmt. to R. S., p. 185.) But the right of set-off in such cases

exists independently of those special enactments, and is founded upon what is now section 236 of the Revised Statutes, as follows:

"SEC. 236. All claims and demands whatever, by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or creditors, shall be settled and adjusted in the Department of the Treasury."

The duty of the accounting officers in matters of set-off has frequently been recognized by the courts. (*McKnight's case,* 13 C. Cls. R., 306, affirmed on appeal; *Bonnafon's Case*, 14 C. Cls. R., 489.) * * *

It is submitted that, pursuant to express provision of law, the Comptroller General of the United States is required to settle and adjust all claims and demands whatever in which the United States are concerned, whether as debtor or creditor, in so far as payment from general appropriations are concerned, that where a balance is certified due the United States the Comptroller General is required to superintend its recovery; that the method of this recovery may be by any lawful means in the discretion of the Comptroller General; that in event of suit, his settlements establish a prima facie case; and that he has the legal right, if in his discretion he deems such action expedient, to set off the indebtedness or require such set-off to be made by a disbursing officer against any credits accruing to the debtor from general appropriations, whether that debtor be a naval officer, as appellee here, or

any other officer or employee, not including judges of the United States. This is but the practice required and followed since the Ordinance of September 26, 1778, and recognized and enforced by the cited decisions of the courts until an apparent misconception and misapplication of the decision in *Smith* v. *Jackson* (246 U. S. 388) led to the recent decisions of the district courts on which appellee in part relies.

It is interesting and instructive to note that the United States Supreme Court in a unanimous decision of November 12, 1923, in *McConaughy* v. *Morrow* (263 U. S. 39), on practically the same state of facts and law as were involved in the *Smith case* but where the salary of a judge was not concerned, held that rental of quarters in the Panama Canal Zone could be offset or deducted from the salary of officers and employees of the United States occupying said quarters in the Canal Zone. One of the reasons for the difference in the conclusions of the two opinions is that the learned Chief Justice of the Supreme Court was at one time Secretary of War, in charge of the Panama Canal and familiar from actual experience with the law and the facts in controversy, just as in another day a Chief Justice of that great court had been both Attorney General and Secretary of the Treasury, familiar with the actual workings of the financial machinery of the United States, and refused to direct issuance of a writ of mandamus

against the Secretary of the Navy in *Decatur* v. *Paulding* (14 Peters, 496), requiring payment of money from a general appropriation. That experience no doubt prompted him to say in the course of his opinion that—

> The interference of the courts with the performance of the ordinary duties of the executive departments of the Government would be productive of nothing but mischief; and this power was never intended to be given to them. The court should not entertain an appeal from one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise discretion or judgment. Nor can it, by mandamus, act directly upon the officer, or guide and control his judgment or discretion in the matters committed to his care, in the ordinary discharge of his official duties.

Reference has been hereinbefore made, pages 36 to 39, to the situation the United States finds itself in to-day by reason of the holding of the court below and other district courts that the United States has not the right which the Supreme Court has stated it has and which is possessed by all of its inhabitants, that is, the right of setting off balances due the United States from a naval or other officer, not including judges, against sums due from the United States to said naval or other officer.

V

The court had no authority to direct the issuance of a writ of mandamus to respondent requiring him to pay from general appropriations sums to petitioner withheld from his pay to apply on his indebtedness to the United States as determined by the General Accounting Office and the Comptroller General of the United States, and to continue the payment of his salary from said appropriations notwithstanding the indebtedness to the United States

The appellant has intrusted to his care as a trust fund a limited amount of public money to pay credit balances determined by the Comptroller General of the United States to be due to officers and enlisted men of the United States Navy and to make certain other payments authorized by law. When this limited amount of money has been exhausted, appellant can not secure additional sums from the general appropriations except upon the countersignature of the Comptroller General. Whether he secures the countersignature to appropriation warrant placing additional funds to his credit depends upon whether the Congress has or continues to appropriate such funds, and if so, whether appellant has discharged his duty in disbursing the advances made to him in accordance with the orders of the Secretary of the Navy and of the Comptroller General of the United States. The mandate of the court below can not operate to require Congress to appropriate sufficient funds to pay appellee his salary nor can it require the Secretary of the Navy to change or withdraw his order of August 11, 1924, nor can it require the Comptroller General to re-

state the account of either appellant or appellee or countersign an appropriation warrant placing additional funds to the credit of appellant.

It will not do to say that the mandate in this case is binding on the Comptroller General requiring him to surrender to the court below his sworn duty of auditing and stating accounts of naval officers in accordance with what he conceives to be the law, for where Congress has deemed it expedient that the accounting officers shall be bound by judicial precedents in the statement of any class of accounts, payable from general appropriations, express provision to that effect has been made by law. See, for instance, the act of June 7, 1924 (43 Stat. 486), requiring the accounting officers to state transportation accounts of land grant railroads in accordance with decisions of the United States Supreme Court.

This rule does not apply to judgments of the courts against the United States for which Congress has made specific appropriations in accordance with the act of September 30, 1890 (26 Stat. 537), and it may be conceded for present purposes that such a rule would not apply where Congress itself had adjudicated the claim and had appropriated a specific sum for the payment of a particular claimant or the salary of a particular officer or employee, as was the case in *United States* v. *MacVeagh* and *Smith* v. *Jackson, supra,* but even in those cases it is to be noted that the accounting officers of the United States either had no juris-

diction whatever, as in the *Smith case,* or had stated the account and certified a balance due as in the *MacVeagh case.* Furthermore, the jurisdictional statutes of the District Court of the Canal Zone and of the Supreme Court of the District of Columbia are more comprehensive than the jurisdictional statute of the court below.

Suppose Congress should not appropriate sufficient funds to pay the salary of appellee, or the Secretary of the Navy should transfer appellant and appellee to a station beyond the jurisdiction of the court below, or the Comptroller General, who is beyond the jurisdiction of the court, should refuse to countersign an appropriation warrant placing additional funds to the credit of appellant from which payment could be made, or appellant should conclude that appellee is entitled to a lesser rate of pay than that stated by the court in its memorandum opinion, what would be the rights of the respective parties and how would it be possible for the court below to enforce its mandate? These considerations alone are sufficient to show the error of the court below in assuming jurisdiction of the controversy and in directing the issuance of a writ of mandamus instead of dismissing the petition and informing appellee that he should sue the United States in the Court of Claims in accordance with the Judicial Code for whatever sum he believes the appellant illegally withheld from his pay. There is no jurisdiction in the courts even under a proper

jurisdictional statute, which appellant contends is lacking here and where the proper parties are before the court, to direct issuance of mandamus except to enforce a ministerial duty and where there is no other adequate remedy. The rule was summarized in *Ex parte Cutting* (94 U. S. 14) as follows:

> The office of mandamus is to compel the performance of a plain and positive duty. It is issued upon the application of one who has a clear right to demand such a performance and who has no other adequate remedy.

This rule was reiterated in *Houston* v. *Ormes* (252 U. S. 469), where the facts were similar in all essential respects to the facts in *Parish* v. *MacVeagh;* that is, a specific sum of money had been appropriated to pay a particular person and the accounting officers of the United States had not determined that the appropriation was unavailable to pay the claim. In fact, in the *Ormes case,* the accounting officers had taken no action whatever. The proceeding was against the Secretary of the Treasury to require him to perform his ministerial duty of drawing a warrant chargeable to a specific appropriation and where there was no other adequate remedy. Here appellant has no power whatever to draw appropriation warrants; he can secure no funds for disbursement except upon appropriation warrants drawn by another official over

whom he not only has no control but to whom he is subject to control; and the appropriations for the current fiscal year do not appropriate a specific sum to pay appellee his salary and appropriations for subsequent fiscal years have not been made. In fact, Article I, section 8, of the Constitution prohibits the appropriation of money to the use of the military forces for a longer term than two years, and as a matter of practice of which this court will take judicial notice, appropriations are made only for one year, yet the court below directed the issuance of a writ of mandamus commanding appellant to pay appellee, a naval officer, his salary from time to time for an indefinite period.

It is submitted that the most the court below could have done would have been to require appellant in event he had sufficient funds for that purpose to pay appellee the sums theretofore withheld from his pay, but for reasons advanced and statutes and decisions hereinbefore cited the court did not have jurisdiction or authority to command even that much to be done.

CONCLUSION

Upon the whole case it is respectfully submitted that for the reasons stated the decree of the District Court was erroneous, and should be reversed; and that this case should be remanded to the District Court with instructions to dismiss the petition for